filed 3/19/80

IN THE SUPREME COURT OF THE UNITED STATES

No. 79-1508

THOMAS E. BROWN,

APPELLANT,

V.

UNITED AUTOMOBILE, AEROSPACE
AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, UAW, et al.,

APPELLEES

On Appeal From The
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 78-1163

JURISDICTIONAL STATEMENT

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IN THE SUPREME COURT OF THE UNITED STATES

No._____

THOMAS E. BROWN,
APPELLANT

vs.

UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS OF
AMERICA, UAW, ET AL,
APPELLES

JURISDICTIONAL STATEMENT

Comes now the Appellant, Thomas E. Brown, by counsel, and pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the judgment entered by the United States Court of Appeals for the Seventh Circuit in this case and should exercise such jurisdiction herein.

I.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, not published, per curiam order is included herein as Appendix "A", page

II.

GROUNDS OF JURISDICTION OF SUPREME COURT

This appeal arises from an action originally filed in the United States District Court for the Southern District of Indiana, Indianapolis Division, against the Appellees, et al, under the Civil Rights Act of 1866, 42 U.S.C. § 1981 wherein, inter alia, the Appellant alleged that the Appellee discriminatorily withdrew a grievance filed on behalf of Appellant. A jury verdict was rendered against Appellant's charges. Upon appeal, the verdict of the jury was affirmed, and judgment thereon was entered on the 20th day of December, 1979. A timely notice of appeal was filed on the 18th day of March, 1980 in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under the provisions of Title 42 U.S.C. § 2000(e)-5(j), and 28 U.S.C. § 1291.

III.

Whether the Court below erred in its findings (1) that Appellant waived his objection to the admissibility of the contents of a telephone conversation by failing to timely object to the same at trial; (2) that the contents of the telephone conversations were so clearly prejudicial that the admission into evidence constituted "plain error" for which a new trial was necessary (3) that the trial court did not err in its refusal or failure to limit the prejudice occasioned by the admission into evidence of the telephone conversation by giving timely instructions to the jury.

IV.

STATEMENT OF THE CASE

Thomas E. Brown, Appellant herein, brought this action against the Appellees under the Civil Rights Act of 1866, 42 U.S.C. § 1981 alleging, inter alia, that the Appellee discriminatorily withdrew a grievance filed on behalf of the Appellant on account of his race. The case was tried before a jury with Judge William E. Steckler presiding. A 4-3 jury verdict was returned against the Appellant and in favor of the Appellees. The trial court entered judgment on the jury verdict on December 1, 1977.

On March 20, 1978, Appellant filed his Notice of Appeal to the United States Court of Appeals for the Seventh Circuit. Questions on appeal were submitted to that Court for consideration on December 5, 1979.

On December 20, 1979 the Court of Appeals affirmed the judgment of the trial court, and judgment was entered. This appeal raises substantially the same question as that presented to the Court of Appeals, namely, whether the admission at trial of testimony by a company supervisor that he had a telephone conversation with the Appellant wherein the Appellant allegedly made threatening remarks was error.

V.

SUBSTANTIALITY OF FEDERAL QUESTION

This appeal presents important and substantial questions, as hereinafter described, which requires plenary consideration, with briefs on the merits and oral arguments for their resolution.

Substantial federal questions involve the use and admission of evidence gleened from or directly attributable from telephone conversations. No clear direction or pattern exists to authoritatively guide the Courts in their decision whether or not to admit this type of evidence. The obvious prejudicial effect to the person against whom this evidence is sought to be used of this type of evidence, without guidance, presents serious Constitutional questions, touching on the "due process" clause of the Fifth and Fourteenth Amendments to the United States Constitution.

The Court has denied review of this issue and as a result this area of the law of evidence has remained "muddled" by inconsistent ruling in the Circuits. This issue is ripe for review and requires for its resolution a full briefing of the merits.

VI.

CONCLUSION

For the reasons stated above, the Appellant submits that this appeal brings before the Court substantial and important questions affecting Constitutional liberties which require plenary consideration, with briefs on the merits and oral argument, for their resolution.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19 TH DAY OF March, 1980.

BY: _____
JOHN W. BROOKS

_____
KEVIN A. HOLLOWAY

Attorneys for Appellant

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VII.
APPENDIX

A. Opinion of Court of Appeals for the Seventh Circuit

B. Order of the Court of Appeals for the Seventh Circuit

C. Notice of Appeal

CERTIFICATE OF SERVICE

I, John W. Brooks, the attorney of record for Thomas E. Brown, the Appellant herein, hereby acknowledge and certify that I have served a copy of the foregoing Jurisdictional Statement upon the Attorneys for the Appellees, UAW, Barry A. Macey, MILES SEGAL & MACEY, 445 North Pennsylvania Street, Indianapolis, Indiana by hand delivery this 19 th day of March, 1980.

JOHN W. BROOKS, Attorney for Appellant

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Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

December 20, 1979

BEFORE

Hon. Thomas E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Philip W. Tone, Circuit Judge

THOMAS E. BROWN, Plaintiff-Appellant	)	Appeal from the United States District Court for the Southern
No. 78-1163 vs.	)	District of Indiana, Indianapolis Division
UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL, Defendants-Appellees	)	No. IP 74-498-C William E. Steckler, Judge

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of Indiana, Indianapolis Division.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
SUBMITTED DECEMBER 5, 1979

December 20, 1979

BEFORE

Hon. Thomas E. Fairchild, Chief Judge
Hon. Luther M. Swygert, Circuit Judge
Hon. Philip W. Tone, Circuit Judge

THOMAS E. BROWN, Plaintiff-Appellant	)	Appeal from the United States District Court for the Southern
No. 78-1163 vs.	)	District of Indiana, Indianapolis Division.
UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., Defendants-Appellees	)	No. IP 74-498-C William E. Steckler, Judge.

ORDER

Plaintiff-Appellant, Thomas E. Brown, appeals from a judgment entered pursuant to a jury verdict which found that he was not discriminated against by his union, the defendant-Appellee. On appeal Brown raises several evidentiary issues.

Brown was employed at the Chrysler Corporation Plant in Indianapolis from June, 1957, to July, 1968 - when he was discharged for striking a foreman. A grievance was filed by his union--the appellee and the exclusive bargaining representative for Brown. The grievance was processed through the fourth step of the grievance procedure, but Chrysler refused to reinstate Brown. Thereafter, the union concluded

that a favorable award at arbitration was unlikely and thus withdrew his grievance. Brown filed a complaint in the district court alleging that the grievance was withdrawn solely because of his race.

At trial the union introduced testimony that, after the discharge, Brown made several threatening phone calls to the Chrysler Plant. William Butcher, the night shift superintendent, testified that he received a phone call from someone who identified himself as Thomas Brown. When Butcher was asked what the person who identified himself as Brown said, Brown's counsel objected on the ground that the proper foundation to admit the substance of the conversation was not laid. The objection was sustained, and the union's counsel then asked Butcher if he knew Brown's voice. Butcher answered that he did. On cross-examination Butcher again answered that he knew Brown's voice. At no time after the initial objection was sustained did Brown's counsel object to the foundation laid by the union.

Brown raises several evidentiary issues on appeal. He does not challenge the sufficiency of the evidence to support the verdict against him, nor the propriety of the instructions. The focus of his assignment of error is the admission of the testimony of William Butcher into evidence.

Brown claims that there was not a proper foundation to admit the telephone calls into evidence. The union contends that Brown's counsel's failure to object to the foundation elicited after his initial objection was sustained constituted a waiver and thus is not cognizable on appeal.

It is clear that if a party fails to object to evidence, that party cannot assign as error the admission of the evidence. As Professor Wigmore states "(a) rule of Evidence not invoked is waived." Wigmore, Evidence § 18 at 321 (3d ed. 1940) (emphasis original). Likewise, where a party objects to evidence and the objection is sustained, the party must reassert his objection if the same evidence is offered. McCormick, Evidence § 52 at 118 (2d ed. 1972). Thus, we hold that Brown waived his right by failing to object again when new foundation was laid.1/

Brown also claims that this telephone conversation was not relevant and that if relevant, its probative value was outweighed by the prejudice. Fed. R. Evid. 403. These objections were never made at the trial court and thus have been waived. Fed. R. Evid. 103. At trial Brown objected only on foundation grounds. This specific objection is not sufficient to preserve these grounds for assignment of error on appeal.

1/ We note that the authentication was sufficient to admit the phone call into evidence. A telephone conversation

can be authenticated by identification of the voice or by circumstantial evidence. United States v. Bucur, 194 F.2d 297 (7th Cir. 1952).

In response to the waiver argument Brown urges the Court to review these claims on the doctrine of plain error. The doctrine does apply to civil cases. Fed. R. Evid. 103(d). However, in the present case it is clear that the admission of the telephone conversation was not plain error. Indeed, it cannot be concluded that admission of the telephone call was error which would be recognized had it been objected to at trial. The evidence was relevant to the union's defense. Brown's cause of action required proof of discriminatory action on the part of the union. The fact that Brown threatened to blow up the place of work is certainly probative of the union's non-discriminatory decision to not pursue the grievance. The union might have concluded that Chrysler would never reinstate an employee who engaged in such behavior.

Brown's contention that it was plain error to not exclude the evidence because its probative value was outweighed by the prejudice fares no better. Without engaging in this balance, which is properly done by the district court, we note that the telephone call was very probative on the union's acting in good faith. Brown makes only conclusory statements to the effect that the testimony was

prejudicial or that it "inflame(d) the emotions of the jurors." There is no attempt to specifically delineate the prejudicial inferences drawn by the jury. The jury could have drawn the prejudicial inference that Brown was generally a violent person. However, it would have been in the discretion of the district court to decide that the probative value of this evidence--demonstrative of violence toward the employer--outweighed whatever prejudice might have been caused.

Finally, Brown argues that it was error to not give a limiting instruction on the jury's use of the telephone call. Because he failed to object to the instructions at trial, Brown cannot assign this as error. Fed. R. Civ. P. 51. Colonial Refrigerated Transportation, Inc., v. Mitchell, 403 F.2d 541 (5th Cir. 1968). Brown's contention that it was plain error to not give a limiting instruction fails for the reasons noted above--the admission of the phone conversation into evidence was not error, much less plain error. Thus, there was no need for a limiting instruction.

The appellee's motion to affirm without oral argument pursuant to Circuit Rule 15 is granted. The judgment of the district court is affirmed.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NO. 78-1163

THOMAS E. BROWN, Plaintiff/Appellant	)
vs.	)
UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL., Defendants/Appellees	)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Thomas E. Brown, the plaintiff-Appellant herein, hereby appeals to the Supreme Court of the United States from the final order of this Court, affirming the judgment of the District Court, entered by this Court in this action on the 20th day of December, 1979.

This appeal is taken pursuant to Title 23 U.S.C. § 1291.

ALL OF WHICH YOU ARE NOTIFIED THIS 19 TH DAY OF March, 1980.

BY: John W. Brooks
JOHN W. BROOKS

Kevin A. Holloway
KEVIN A. HOLLOWAY
Attorneys for Appellant

CERTIFICATE OF SERVICE

I, John W. Brooks, the attorney of record for Thomas E. Brown, the Appellant herein, hereby acknowledge and certify that I have served a copy of the foregoing upon the Attorneys for the Appellees, UAW, Barry A. Macey, MILES SEGAL & MACEY, 445 North Pennsylvania Street, Indianapolis, Indiana by hand delivery this 19 th day of March, 1980.

John W. Brooks

JOHN W. BROOKS, Attorney for Appellant

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